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Supreme Court of the United States

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,

APPELLANTS,

vs.

WILSON CYPRESS CO.

APPELLEE.

MOTION BY APPELLEE TO DISMISS THE APPEAL OR TO AFFIRM THE SAID DECREE AND BRIEF IN SUPPORT OF MOTION.

J. C. COOPER, H. C. CLARK,
Counsel for Appellee.

THE DREW PRESS, JACKSONVILLE 451776

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,

vs.

WILSON CYPRESS COMPANY, A CORPORATION.

MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE SAID DECREE

The appellee in the above entitled cause by its solicitors and counsel of record, moves the Court to dismiss the appeal from the decree of the United States Circuit Court of Appeals for the Fifth Circuit, taken and allowed in the said above entitled cause, or to affirm the said decree, upon the following grounds:

1. That this Court is without jurisdiction to determine said appeal.

2. That the record, decrees, rulings, opinions and decisions in said cause and the grounds thereof and reasons therefor, as stated in the opinions and decisions, present no Federal questions.

3. That the record, decrees, decisions and opinions in said cause show that the said questions

involved were decided upon the Statute of Limitations under the laws of the State of Florida and the laches of appellants, and not upon any Federal question.

4. That the questions sought to be raised by appellants on which the decision of the cause will depend are so unsubstantial as not to need further argument.

J. C. COOPER,
H. C. CLARK,
Solicitors and of Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925.

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,

APPELLANTS,

vs.

WILSON CYPRESS COMPANY,

APPELLEE.

To the Solicitors and Counsel for Appellants:

Please take notice that Appellee in the above entitled cause on the 5th day of October, A. D. 1925, at 12 o'clock noon, or as soon thereafter as Counsel can be heard, at the Supreme Court Room in the City of Washington, in the District of Columbia, will move this Honorable Court upon the records herein to dismiss the appeal taken and allowed in the above stated cause from the decree of the United States Circuit Court of Appeals for the Fifth Circuit, or to affirm the said decree, upon the grounds stated in said Motion, copy of which is herewith served upon you.

J. C. COOPER and H. C. CLARK,
Solicitors and Counsel for Appellee.

To Messrs. Wm. W. Dewhurst, St. Augustine, Fla.
Jos. H. Jones, Orlando, Florida.
John C. Jones, Orlando, Florida.
Solicitors and Counsel for Appellants.

I hereby accept service of the foregoing Motion and Notice for submitting same on Monday, the 5th of October, A. D. 1925.

September ....., 1925.

.....

Solicitors and Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925.

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.

vs.

WILSON CYPRESS COMPANY.

Appeal from United States Circuit Court of Appeals for 5th Circuit.

BRIEF OF APPELLEE ON MOTION TO DISMISS FOR WANT OF JURISDICTION OR TO AFFIRM THE DECREE.

STATEMENT OF THE CASE.

Official reports of previous opinions in this case are:

Wilson Cypress Co. vs. *Pozo y Marcos* (decided February 4, 1913), 202 Fed. 742; 121 C. C. A. 578.

Wilson Cypress Co. vs. *Del Pozo y Marcos* (decided March 15, 1915), 236 U. S. 635; 59 L. Ed. 758.

Del Pozo et al vs. *Wilson Cypress Co.* (decided May 31, 1924), 299 Fed. 261.

This cause is now before the Court on Motion of Appellee to dismiss the appeal for want of jurisdiction or to affirm the decree. The grounds are stated in the motion, namely, that the cause now presents no Federal questions and that the cause was decided in both the District Court and United States Circuit Court of Appeals upon the Statutes of Limitations under the laws of Florida and upon the laches of the appellants. Further that the questions on the appeal are so unsubstantial as not to need

further argument. This is a Bill in Equity filed on May 1st, 1907, by the appellant against the appellee for the cancellation of certain deeds under which appellee claimed title, and to enjoin the appellee from taking possession of the lands described, or claiming the lands, or interfering with appellant's alleged possession. Some of these deeds were for the non-payment of taxes. The transcript of the record has not been completed or printed in this case, but for the convenience of the Court we have referred in this brief to the pages of the first part of the record which was filed in this Court on a former appeal.

One from John Simpson, Sheriff and Tax Collector to John Starke, dated 5th of July, 1852, page 28 of the record, and

One from Robert C. Partin to William Mills on the 23d of April, 1872, pages 30 and 868 of the record.

Also certain other deeds, to-wit:

Deed from William Mills to George C. Powell, dated 3d of May, 1872, page 871 of record, and

Deed from George C. Powell to Henry Sanford, dated 27th of October, 1881, page 874 of record.

Deed from George C. Powell to Henry Sanford, dated 15th of November, 1881, page 878 of record.

Deed from Henry Sanford to Trustees of Florida Land and Colonization Company, dated 9th of January, 1884, page 896 of the record.

Deed from Trustees to Florida Land and Colonization Company, dated 2d day of December, 1899, page 883 of the record.

Deed from Florida Land and Colonization Company to Appellee, Wilson Cypress Company, dated May 3d, 1900, page 32 of record.

The Bill also prays for the cancellation of other tax deeds and tax certificates held by said Henry S. Sanford and by other persons named in the amended Bill. The appellants claim to be the heirs at law of one Theresa Rodriquez. The land described in the bill known as the Theresa Rodriquez Grant was originally granted to one Miguiel Marcos on the 18th of October, 1815, and was favorably reported in 1825 for confirmation by the Commissioners appointed by the United States to investigate this class of Grants, and was afterwards confirmed by Act of Congress of May 23d, 1828. The various grounds on which these deeds are sought to be cancelled as stated in Bill of Complaint and found on pages 1-30 of the record.

The appellee stated in its answer several grounds of defense to the Bill of Complaint found on pages 35 to 67, inclusive of the record. Among the other defenses included in the answer were that the Bill of Complaint was barred by laches and barred under the Statute of Limitations of the State of Florida, and by the adverse possession of appellee and those under whom it claims, that such possession of appellee and those under whom it claims was adverse possession for the statutory period as required by the laws of Florida, and also barred the appellant's right to maintain the bill in this cause. The dates of the several deeds sought to be cancelled under the facts in this case establish the defense of laches to

the Bill of Complaint. The deed from John Simpson, as Sheriff and Tax Collector, to John Starke, was executed on the 5th day of July, 1852, more than fifty years before the filing of the Bill of Complaint; the deed from R. C. Partin as Tax Collector to William Mills, dated 23d of April, 1872, was executed and recorded thirty-five years before the filing of the bill; the deed from Mills to Powell was executed and recorded more than thirty-four years before the filing of this bill. Deeds from Powell to Sanford were executed in 1881, twenty-six years before the filing of the Bill and recorded in 1884, twenty-three years before the filing of the Bill; the deeds from Sanford to the Trustees of the Florida Land and Colonization Company were executed and recorded twenty-three years before the filing of the Bill; the deed from the Trustees to the Florida Land and Colonization Company dated 2d day of December, 1899, were executed more than seven years before the filing of the bill and the deed from the Florida Land and Colonization Company to the appellee, Wilson Cypress Company, was executed on the 3rd of May, 1900. The Bill of Complaint in this cause was filed 1st of May, 1907, two days less than seven years from the date of executing of the said deed to the appellee. The Spanish Grant involved in the case was made in 1815 and recorded by the Commissioners for confirmation in 1825, and confirmed by the Act of Congress of May 23d, 1828. The evidence shows that in 1890 persons under whom appellants claim as defendants sought to procure from the General Land

Office of the United States the patent for these lands. No action ever appears to have been taken by the Spanish Grantees, and those claiming under them, of the grant to obtain patent from the United States between the confirmation of the Grant in 1828 and up to 1889, and no action asserting title or right of possession of the land. The history of the proceedings in the Land Department establishes that on the 12th of February, 1894, the Secretary of the Interior ordered a patent to issue and that this was more than thirteen years from the date of the order to the date of the filing of the bill. On the 26th of June, 1895, a patent was issued by the United States to the heirs of Theresa Rodriquez and this was nearly twelve years before the filing of the Bill. The Bill in this case was filed about twelve years after the executing of the patent and within two days of seven years after the executing of the deed to appellee under which appellee claimed, and the bill was filed after the lapse of a great number of years above stated since the other deeds were recorded under which appellee claims.

The appellee alleged in its answer and the evidence establishes that the Bill of Complaint filed by appellee is barred by laches and long delay, and by the abandonment of the property by appellants and by those under whom they claim title. The Bill is also barred under the Statute of Limitations of the State of Florida. The answer of appellee alleges and the evidence establishes that there were many years of actual possession and occupancy of the land by appellee and those under whom it claims title.

The said George C. Powell went into actual occupation and possession of the land in 1872, when it was conveyed to him, and lived upon and occupied the land to 1881, when he conveyed the same to Henry S. Sanford. This period was sufficient under the Statutes of Limitation of Florida to bar the appellants right of recovery. After 1881 Henry S. Sanford and the Florida Land and Colonization Company were in actual possession of the property until that Company conveyed it to the appellee in 1900. The appellee has been in actual possession of the property since 1900 and was in possession of same at the time the Bill was filed in this cause. The character of the possession is shown in the evidence. The appellee in its answer also insisted that certain necessary parties defendant were not made defendants to the bill. That the appellant was in possession at the time the Bill was filed; that the pedigree of the appellants as heirs at law of Theresa Rodriquez had not been sufficiently alleged or proven. The appellants and those under whom they claim have never paid any taxes upon this property; that the taxes were paid by the Florida Colonization Company from the time it acquired title and by the Trustees of that Company from the time of date of the deeds to said Trustees and the appellee has paid the taxes ever since 1900. The appellants in this case and those under whom they claim never paid any taxes or asserted any claim of ownership or any possession or right of possession except the claim of one Martin, an attorney who claimed to be acting for some of the persons under whom complainants

claimed title, and he also asserts that after the issue of the patent he went on the land and appointed an agent, but at that time those under whom appellee claims title were in actual possession.

The said Owens only avers that he remained in the vicinity of the land or made some claim of possession for about a year or a year and a half, in 1896 and 1897. The appellee also insisted that the appellants were barred by estoppel and by long acquiescence in the possession and use of the property by appellee and those under whom it claims title. Further, that under the facts of the case, the Court would presume after this great lapse of time that a deed or grant had been executed by appellants or those under whom they claim title to appellee or those under whom it claims title.

THERE ARE NO FEDERAL QUESTIONS TO BE DETERMINED IN THIS CAUSE AND ALL OF THE FEDERAL QUESTIONS ORIGINALLY RAISED BY THE PLEADINGS IN SAID CAUSE WERE DECIDED IN THE OPINION OF THE UNITED STATES SUPREME COURT HERETOFORE RENDERED IN THIS CAUSE.

This case was heretofore decided by this Honorable Court on the 15th day of March, 1915, and the decision is reported in 236 U. S. Supreme Court Reports, pages 635 to 657, 59 Law Edition, pages 759 to 771, inclusive.

The Supreme Court in its opinion in this cause made a statement of the case and in its opinion

stated the history of this Spanish Grant and of its confirmation and survey. The Court further decided that: "All the conditions of a taxable property existed." The Court in its opinion discusses the effect of confirmation of the grant, its survey and the effect, if any, of a patent of a confirmed Spanish Grant, and then uses this language: "It will be observed from the allegations of the bill which we have taken the trouble to repeat that the foundation of the title of complainants is a grant from Spain which was reported as valid by the Board of Commissioners of the United States, recommended by such Board for confirmation and confirmed by the Act of Congress of May 23d, 1828, to the extent of one league square, to be located by the claimants, subsequently (in 1851) a survey was made under a contract of the Surveyor General of Florida, which has been accepted as the segregation of the land and set forth in the patent, and that the sole basis of the patent is the title so derived and confirmed."

The Court in its opinion further stated: "We have been at pains to cite at length from these decisions to show how little stood in the way of the complete assurance of Complainants title, and that its foundation was the direct confirmation of it by the Acts of May 23d, 1828, and that the grant needed definition only by a survey which was made as we have seen in 1851. This survey was referred to by counsel for complainants, by the Commissioner of the Land Office and the Secretary of the Interior, and in the patent it being made the foundation of the latter."

The Court then refers to further questions involved in the litigation as to the tax sales and the assessment of the land for taxes and further states as to these questions, "their solution depends upon testimony somewhat voluminous and not very satisfactory, of which there is no analysis either by the Master or by the Trial Court, or by the Court of Appeals. "The Court in its opinion also states that there were contentions in the case as to laches of the complainants and that the suit was barred by the Statute of Limitations and as to adverse possession of the property from 1872 to the bringing of the suit by parties under whom defendant claimed title and under the defendant. The Court in its opinion also refers to the fact that it was contended that all during this time, the complainants neither paid nor offered to pay the taxes, that the other parties did, and the defendant paid same from 1890, and defendant had made expenditures on the property; that complainant asserted no claims to the land against the defendant and let twelve years elapse after the patent was issued before bringing this suit. The Court in its opinion stated that the Court below rejected these objections referring to laches, Statute of Limitations, adverse possession, improvements and payments of taxes. This Court in its said opinion referred to the mistakes or errors made by the trial Court in the first trial of the cause as follows: "The Courts below rejected these contentions. The trial Court seemed to have arrived at its conclusion by disregarding the possession whatever it was which was held by defendants

predecessors in the title or its possession prior to the issue of the patent. 'It makes no difference,' the trial Court said, 'what the occupation or possession may have been while the title to the property was in the United States and it is not considered that the possession during such time can be resorted to to determine whether or not the property was after issue of the patent in the actual possession of the defendants through its agent sufficiently to legally bar a right to maintain a bill to remove a cloud from title.'"

This Court in said opinion referring to the language of the trial Court just quoted, states: "We think the learned Court erred in this. The continuity of possession was a factor to be considered. The evidence of numerous witnesses seems to conflict upon the character and extent of such possession, an analysis of which can better be made by the master or the trial Court than by an appellate Court." This Court then stated that these questions of fact were referred to because the Court below had erroneously omitted to pass on a number of important questions. The Court then closed this opinion with the following statement: "And we repeat, a consideration of such testimony should be made in the first instance by the trial Court."

It is thus apparent from the opinion in this case heretofore rendered by the Supreme Court that the Federal questions originally involved were determined and decided in that opinion. The effect of The Grant and its confirmation and survey on all of the questions of fact in the case were decided

and it was determined that the confirmation of the Grant by Congress and the survey of the Grant segregated this land from the Public domain and that it was then subject to taxation and that the defendants claiming it could rely upon the defense of laches by the complainants and that the bar of the Statute of Limitations and by adverse possession and that the payment of taxes by defendants and those under whom they claim and expenditures on the land were all to be considered in connection with the above mentioned defenses. The case was remanded and these questions of fact under the testimony in reference to same were to be passed on by trial Court. These were the questions of fact under the testimony before the District Court as the trial Court on the second trial of the cause under the mandate of the Supreme Court and these were the questions of fact before the United States Circuit Court of Appeals on the second appeal in said cause. The original bill was filed in this cause May 1st, 1907, and the first decree entered by the Trial Court January 13th, 1912, and the first opinion of the United States Circuit Court of Appeals was entered February 4th, 1913, 202 Federal, 742. The opinion of the United States Supreme Court herein above referred to is dated March 15th, 1915, a second decree of the district Court dismissing the bill is dated in July, ~~1925~~, and found in transcript of record pages 1120, to 1123 inclusive. The opinion of the United States Circuit Court of appeals of the 5th Circuit from which the present appeal is taken is dated May 31st, 1924, and is found in the Fed-

eral Reporter, volume 299 pages 261 to 263 inclusive. It will thus be seen that the Appellants in the present appeal are seeking after seventeen years of litigation to have reheard and to retry all of the questions of law and fact that have been pending during this long litigation and all of the Federal questions which have already been determined by this Court in its opinion dated 15th of March, 1915, and in volume 236 U. S. Supreme Court, pages 635 to 657, 59 Law Ed. 759 to 771 inclusive, and to have a second trial upon the question involving the evidence and under the local laws.

OPINION OF THE DISTRICT COURT

The district Court uses the following language in its opinion: "The Supreme Court discusses the evidence and remands the case for findings upon the validity of the tax deeds; upon adverse possession by defendant and its predecessors in title and upon the question of laches. "The District Court discusses the facts of the possession by defendant and those under whom it claims, and the judge in that opinion states: "In view of the character of the land, I think there has been sufficient evidence to establish title by adverse possession in the defendant, and that the actual possession shown of portions of the land under color of title, established title to the whole grant." The opinion of the District Court is also as follows: "I think the claim of plaintiffs is barred by laches. Powell began to live upon the property, and to assert acts of ownership and dominion over it thirty-five years before this suit was brought. For more than fifty years

plaintiffs failed to pay taxes. It is too late now, after so great a lapse of time and after the property has increased many times in value, to seek the active aid of a Court of Equity." It is thus apparent that this decision of the trial Court was based on matters of fact and acts constituting adverse possession and the application of the statutes of limitation and upon the acts of the plaintiffs and those under whom they claim showing they were barred by laches, and that it was too late after this great lapse of time and after the property had increased many times in value to bring and maintain this suit. We submit that the issues on which the case was tried in the second trial in the District Court were issues of fact depending upon the evidence and issues of applying the Florida Statutes of Limitations as local law and that no Federal question was then before the District Court, after the decision of the Supreme Court and its mandate. The case before the United States Circuit Court of Appeals did not present Federal questions and the decision was not upon federal questions.

The decision of the United States Circuit Court of Appeals of the 5th Circuit in this case is found in Federal Reporter, Volume 299, pages 261 to 263 inclusive. That Court stated in its opinion that it was asserted by the appellants in that Court that prior to the issue of patent the land was not taxable and was not subject to be acquired by a tax title or by possession adverse to the appellants and those through whom they claim, and that prior to the date of the patent, the evidence could not properly be considered

in passing on the defense of laches set up by the appellee. The Court further states: "We are of the opinion that contentions dependent upon the just stated proposition have been disposed of by the decision of the Supreme Court. That Court decided that the land was taxable from the date of the survey in 1851; the ground of that decision being that the title relied upon by appellants was vested upon the identification of the land granted by the survey by field notes and official plats hereof were approved by the Surveyor General June 20th, 1851. The Supreme Court in its opinion discussed the defenses based on tax title, adverse possession and laches, but did not pass on those defenses because the evidence in regard to them had not been considered by the trial Court. It remanded the cause for further proceedings in accordance with an opinion which showed that defenses based on tax title, adverse possession or laches, after the title under the grant was vested by the survey of 1851, were available to the appellee after they were found to be duly supported by evidence. The questions whether the title asserted by the bill was prior to the date of the patent subject to be lost by adverse possession, and whether conduct prior to that date of owners of that title properly could be considered and based on the defense of laches are no longer open ones in this Court. Cite Joplin vs. Chachere, 192, U. S., 94; 24 Sup. Ct. 214; 48 Law. Ed. 539; Sanchez vs. Deering (CCA 5th Circuit) 298 Federal, 286. The Court then discussed the facts constituting adverse possession by appellee and those un-

der whom it claims. The Court in this opinion calls attention to the fact that for more than fifty years, prior to the bringing of this suit, the appellants and those through whom they claimed, paid no taxes on the land and that during all that time the land was treated as taxable by the Florida authorities and that it was openly claimed and dealt with by persons claiming under deeds made under sales of the property for taxes. The Court further finds as matter of fact the following: "For more than thirty years immediately preceding the bringing of the suit, appellee and those under whom it claimed, kept the taxes on the land paid up, openly asserted ownership and exercised such dominion and control as made it notorious that ownership of the land was claimed by them. During more than thirty years while the land was so dealt with by parties claiming and carrying the burdens of ownership the appellants and their predecessors did not even make known their claim to the adverse claimants, though during all that time remedies for enforcement of their rights were available, and made no claim at all until after the land had greatly increased in value."

The Court then states in reference to laches in this case as follows: "The evidence warranted the conclusion that by the suit the Court was called on to grant equitable remedies for the enforcement of a claim which for a period longer than an ordinary lifetime was entirely dormant under circumstances indicating the absence of any intention on the part of its owners to assert the ancient and apparently

the long abandoned right against adverse claimants, who successively and openly as owners dealt with the operation of it in the belief of the non-existence of any such rights. We are of the opinion that there was ample support in the evidence for the conclusion that the appellants and those under whom they claimed were guilty of such laches as justifies a Court of Equity in refusing its aid for the enforcement of the claim asserted." A consideration of the opinion of the United States Circuit Court of Appeals establishes that the decision in that Court was based upon questions of fact and of possession constituting adverse possession and of the Statutes of Limitations under the laws of Florida; and that under the facts and the evidence that Court found and determined that the appellants in this case and those under whom they claimed were guilty of such laches that they were not entitled to any relief in the cause. None of the issues before the Court and none of the grounds on which the case was heard and determined were Federal questions, but were questions of local law and questions under the evidence of adverse possession, the Statute of Limitations and the bar of laches. We submit, therefore, that there were no Federal questions in the case before the United States Circuit Court of Appeals and none decided by it, and therefore no Federal questions are brought to this Court under the Appeal from the decree of the United States Circuit Court of Appeals in this case.

ONLY QUESTIONS OF FACT AND OF LOCAL LAW ARE IN THIS CASE

We submit that the opinions of this Court and the District Court and of the United States Circuit Court of Appeals establish that after the first opinion of the Court, there were no Federal questions to be determined by the District Court or by the United States Circuit Court of Appeals and no Federal questions were determined by either of those Courts. That the case before the District Court and the case established by the opinion and decree of the District Court was one of fact under the evidence and under the statutes of the State of Florida, that the case before the United States Circuit Court of Appeals and the decision and decree of that Court were based on these questions of fact and the Statutes of Florida. That the Appeal now pending in this cause in this Court should be dismissed or the decree affirmed because the appellants seek a review of the decisions and decrees of the District Court and of the United States Circuit Court of Appeals on such questions of fact and evidence as to adverse possession, the Statute of Limitations, and the bar of laches, and that this Court will not review the decree of the Circuit Court of Appeals on such questions of fact and evidence and local law.

The Jurisdiction of the Supreme Court in causes heard and determined by the United States Circuit Court of Appeals in a case like this depends on the

existence of Federal questions and Federal questions which were decided by the United States Circuit Court of Appeals. The cases in the United States Supreme Court which we will hereinafter call to the attention of the Court in this brief establish that the questions which were before the United States Circuit Court of Appeals were not Federal questions and that no Federal questions were passed on by the District Court or the United States Circuit Court of Appeals.

FORMER DECISION OF THE COURT IN ITS OPINION HERETOFORE RENDERED INCLUDING A RULING ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

In the decision in this case rendered by this Court hereinbefore referred to the Court says as to Motion made to dismiss that appeal, that the bill "Seeks to quiet the title of complainants to a tract of land commencing in a Grant from Spain depending for its completeness upon the treaty with Spain and laws of the United States and the action under those laws by the act of the land department of the United States and it especially relies on those laws to defeat defendants claim of title and to have it removed as a cloud upon that asserted by complainant." The Court further says that the contentions of the complainants depend upon the laws of the United States, hence the Motion to Dismiss at that time was denied. In this opinion this Court determined and settled all of the Federal questions in the case and remanded the case because it required consideration of the testimony and exami-

nation of local laws and decisions. The District Court so construed the opinion and determined its jurisdiction was to pass on questions involving testimony and involving local laws and decisions and dismissed the bill on grounds arising out of the evidence and under local laws. The case therefore, when it was remanded to the lower Court and when it was decided and determined by the lower Court, was upon issues that did not call for the decision of any Federal questions. The Court below treated these questions as already determined and practically formed no part of the record for further determination or decision. The case when it was heard by the trial Court did not involve a construction of the treaty or the laws of the United States. The cases in which the decision of the United States Circuit Court of Appeals is made final are those which do not arise out of Federal questions or questions involving the construction or application of the Constitution or Treaties of the United States or Federal laws. The jurisdiction in the case of the District Court was originally on account of the existence of Federal questions and on the ground of diversity of citizenship. In this class of cases when this Court on examination of the appeal finds that the Federal questions have already been determined by this Court and its decision has been followed by the trial Court and by the United States Circuit Court of Appeals on the Federal questions, it will not reexamine the general questions of law passed upon by the trial Court and by the United States Circuit Court of Appeals, but will

leave all other questions than the Federal questions as the Circuit Court of Appeals has determined them. Under the Federal Judiciary Act and the Act creating United States Circuit Court of Appeals and amendments thereto, there should be but one appeal upon the merits. In this case the District Court and United States Circuit Court of Appeals have simply followed the decisions of the Supreme Court on Federal questions. This case when it was retried by the District Court and reheard before the United States Circuit Court of Appeals was in very much the condition of the cases where it is held that the decision of the United States Circuit Court of Appeals is final. The jurisdiction of the trial Court (then the Circuit Court) originally was on the ground of diversity of citizenship and also on the ground of questions arising under the Constitution and laws of the United States. In this case the appellants in the cause now in this Court first took their appeal to the United States Circuit Court of Appeals of the 5th Circuit and the cause was there determined upon its merits. An appeal has now been taken to this Court from the decision of the United States Circuit Court of Appeals to review the decision of that Court on questions arising purely upon the evidence and upon local law. This is the character of case that is now in this Court on this Appeal. See cases of Ayres vs. Holdsdorfer, 187 U. S. 590; 47 Law Ed. 315 and 316; Colorado Central etc. vs. Tooke, 150 U. S. 138; 37 Law Ed. 1030. McFadden vs. U. S., 213 U. S. 288; 53 Law Ed. 802. See also Loeb vs. Columbia Twp. 179 U. S. 472; 45

Law Ed. 280. In the case of Ayres vs. Holsdorfer, the Court uses the following language: "In Robinson vs. Caldwell, 165 U. S. 359, 41 Law. Ed. 745, it had been decided that 'it was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals.' " This was affirmed in Leob vs. Columbia Township. It is there observed that the plaintiff in that action could have carried the case to the Circuit Court of Appeals, but had he done so, he could not thereafter have invoked the jurisdiction of this Court upon another Writ of Error to review the judgment of the Circuit Court."

This case after the decision in this Court on Federal questions comes either within the class of cases where jurisdiction is made final on the determination by the United States Circuit Court of Appeals or the class of cases in which the decision of the United States Circuit Court of Appeals has been on general law, and in either event this Court on inspection of the record will dismiss the appeal or decline to reexamine the questions passed on by the United States Circuit Court of Appeals under general law. See also Empire State etc. Co. vs. Henley, 198 U. S. 297; 49 Law Ed. 1058. Robinson vs. Caldwell, 165 U. S 359; 41 Law Ed. 745.

In this latter case, this Court decided: "As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of this Court upon the appeal to it from the

Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court." And in the case of U. S. vs. Jahn, 155 U. S. 109, 39 Law Ed. 87, where the question of the jurisdiction of the United States Circuit Court of Appeals and the effect of the appeal to that Court and of its decision is discussed See also McLish vs. Roff, 141 U. S. 661. This Court in the case of Chicago Junction R. R. Co. vs. King, 222 U. S. page 222, 56 Law Ed. 173, has used language determining what questions this Court will review in passing on the decree of the United States Circuit Court of Appeals, as follows: "That although we have jurisdiction to review, the cause of action, as stated in the pleadings, rested upon the safety appliance law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the Judiciary Act of 1891, 26 Statutes at Large, 826, Chapter 517, U. S. Comp. Statutes 1901, page 488, to submit to the final jurisdiction of the Circuit Court of Appeals. Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusions of the Courts below as to the tendencies of the proof. We are of the opinion because, in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole

duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the Court below in any of the particulars complained of." The Court in that case affirmed the judgment of the Court below without any lengthy opinion on the evidence or minute examination of the evidence.

EFFECT OF THE MANDATE OF THE UNITED STATES SUPREME COURT UNDER ITS FORMER DECISION IN THIS CAUSE.

We submit that the only question which was open for review in this case was whether the District Court had followed the decision and mandate of this Court on the former appeal as to the Federal questions determined in such former appeal. The appeal, if any, upon which a decision could be made as to whether the District Court had carried out the mandate was one that should have been brought directly to this Court. The question as to whether the District Court properly construed and properly carried out the mandate of this Court must be determined on a new appeal to this Court or upon a mandamus of this Court directed to the lower Court to enforce the mandate. If a new appeal were taken, it must be to this Court, or must have been certified by the District Court to this Court, if it involved the jurisdiction of the District Court to construe the mandate. The Federal Judiciary Acts provide that any appeal involving the jurisdiction attempted to be exercised by the District Court and its juris-

diction is drawn in question then that must be determined on appeal certified direct to the Supreme Court. The appellants if they conceived the District Court had improperly construed the mandate of this Court or had refused to follow the mandate in applying the law on Federal questions, should have had that question certified to this Court direct, or should have appealed to this Court, or should have brought mandamus proceedings in this Court to construe and enforce the mandate. See the case of Re: Sanford Fork & Tool Co. et al, 160 U. S. Supreme Court Reports, pages 249, 251; 40 Law Ed. pages 414, 416.

All of the other questions involved in the appeal from the decree of the District Court to the United States Circuit Court of Appeals were questions of general law or under the local laws of Florida. In this case the appellants first appealed from the decree of the District Court to the United States Circuit Court of Appeals of the 5th Circuit, and their present appeal is now to this Court, and they have attempted in that appeal to have reexamined the Federal questions involved in the case and whether or not the District Court had properly construed or carried out the mandate of the Supreme Court, and also all of the questions arising under general law and under the evidence. The Federal questions had already been determined by the former decision of the Supreme Court in this case. The questions as to whether or not the mandate had been properly construed and carried out should have been tested by direct proceedings in mandamus or by having the

case certified as a matter of jurisdiction to this Court, or by a new appeal on the ground that the case still involved rights under the Constitution, laws and treaties of the United States, but the appellants took their appeal to the United States Circuit Court of Appeals on all of the questions and sought there to have examined the decree of the District Court. A correct construction of the Federal Judiciary Acts does not authorize a second appeal upon the merits where the only questions as shown by the record which were heard and determined by the District Court and by the United States Circuit Court of Appeals, are questions of fact under the evidence and under general law or local laws of Florida.

The provisions of the Judiciary Acts under the laws of the United States which are applicable to this case and which establish the jurisdiction in cases appealable direct to the United States Supreme Court and cases in which the decree of the United States Circuit Court of Appeals, is made final are as follows:

Judicial Code, Sec. 238: "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Con-

stitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Judicial Code, Sec. 241: "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs." 36 Stat. at L., 1157, Chap. 231, Comp. Stat. sec. 1218, 5 Fed. Stat. Anno. 2d ed. p. 877." Act of March 3d, 1891, 26 Statutes at Large, 826, Chapter 517 (Comp. Stat. sec. 1108, Title "Judiciary") Sections 5 and 6, 25 Stat. at L., page 693, Chapter 236. Judicial Code Sections 238, 241. As to this case involving only questions of fact, this Court in the case of Bodkin vs. Edwards, 255 U. S. 221; 65 Law Ed. 595, states as follows: "The case, as presented here, turns essentially on questions of fact. Both Courts below, on a review of the evidence, have found the facts in the same way. This Court, under a settled rule, accepts such concurring findings, unless clear error is shown." This Court in the case of U. S. vs. Camou, 184 U. S. 572, 46 Law Ed. 695, "Upon this second appeal we have only to consider whether the Court of Private Land Claims reached its final decree in due pursuance of the previous opinion and mandate of this Court. The decision there made is the law of

the case, and is not open for reconsideration in the subsequent appeal." The Court further stated: "That it is the settled law of this Court that, after a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be reheard or examined on the second."

We therefore submit that this appeal should be dismissed or the Court should decline to reexamine these questions determined on general law or local law and without further argument affirm the decree of the United States Circuit Court of Appeals, and that the motion of the appellee to dismiss the appeal, or that the same be affirmed, should be granted.

J. C. COOPER and H. C. CLARK,
Solicitors and Counsel for Appellee.